IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 679 of 2002

WITH

CRIMINAL APPEAL No. 2287 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

==========

CRIMINAL APPEAL No. 679 of 2002

NANUBHAI BALABHAI THAKORE – APPELLANT

Versus

STATE OF GUJARAT – RESPONDENT

WITH

CRIMINAL APPEAL No. 2287 of 2005

ATUL @ MANSUKH BIKHABHAI KARELIA AND ANOTHER – APPELLANT

Versus

STATE OF GUJARAT – RESPONDENT

==========

Appearance in both the appeals:
MR BS SUPEHIA, FOR THE APPELLANTS.
MR KT DAVE, ADDITIONAL PUBLIC PROSECUTOR, FOR THE RESPONDENT.

==========

CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 03/02/2006

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Criminal Appeal No. 679 of 2002, filed by original accused No. 3 under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against judgment dated June 22, 2001, rendered by the learned Additional Sessions Judge, Gondal, in Sessions Case No. 129 of 1999, by which he is convicted for commission of offences punishable under Section 366 as well as Section 376(2)(g)IPC, and sentenced to suffer RI for 5 years and fine of Rs. 2,000/- (Rupees Two Thousand Only), in default RI for 1 year, for commission of offence punishable under Section 366 IPC, as well as RI for 10 years and fine of Rs. 10,000/- (Rupees Ten Thousand Only), in default RI for 1 year, for commission of offence punishable under Section 376(2)(g) IPC. Criminal Appeal No. 2287 of 2005, filed by original accused Nos. 1 and 4 in Sessions Case No. 129 of 1999 under Section 374(2) of the Code of Criminal Procedure, 1973, is also directed against the same judgment, by which the two appellants are convicted for offences punishable under Sections 366 as well as 376(2)(g) IPC and each sentenced to RI for 5 years and

fine of Rs.2,000/- (Rupees Two Thousand Only), in default RI for 1 year, for commission of offence punishable under Section 366 IPC, as well as RI for 10 years and fine of Rs. 10,000/-(Rupees Ten Thousand Only), in default RI for 1 year, for commission of offence punishable under Section 376(2)(g) IPC. As both the appeals are directed against common judgment dated June 22, 2001, rendered in Sessions Case NO. 129 of 1999, this Court proposes to dispose them of by this common judgment.

2. In view of law laid down in **Bhupinder Sharma Vs. State of Himachal Pradesh, (2003) 8 SCC 551**, the name of the victim is not indicated in this judgment.

3. The facts emerging from the record of the case are as under:

Babubhai Jethabhai, who is father of the victim, is residing at Village Vagadia, Taluka Jamnagar, with his family. Earlier, his marriage had taken place with Ms. Dudhiben, who was daughter of Jadhav Savani of Village Monpara. During the subsistence of her marriage with Babubhai, Ms. Dudhiben gave birth to the victim. The relations between Babubhai and his wife Dudhiben became

strained which resulted into dissolution of their marriage. Thereafter, Babubhai got remarried with Savitaben of Village Devpara, who during subsistence of her marriage with Babubhai, gave birth to two sons. It may be said that right from her birth, the victim was mentally retarded. However, in order to see that the victim was well maintained, Babubhai got her married to one Rajesh Gordhan of Jamnagar, who was handicapped. Rajesh Gordhan was doing sundry work and the victim resided with him for about one and a half year. After one and a half year of his marriage with the victim, Rajesh Gordhan left the victim at her parental house, stating that it was not possible for him to maintain her. The behaviour of the victim was abnormal and Babubhai was of the view that she should be treated at Hosptial for Mental Health, Jamnagar. He, therefore, made an application dated May 14, 1999 before the learned Chief Judicial Magistrate, Jamnagar under the provisions of Indian Lunacy Act, 1912. The learned Chief Judicial Magistrate *vide* order dated May 14, 1999 directed the Hospital for Mental Health, Jamnagar to admit the victim and treat her. Accordingly, the victim was admitted in Hospital for Mental Health, Jamnagar and treated by Dr. Arunbhai Khatri. It was found by Dr. Khatri that the

victim was smiling to herself and was not talking, but her sleep and appetite were normal. The Discharge Committee of the Hospital examined the victim on August 6, 1999 and decided to discharge the victim from Hospital, as members of the Committee were of the view that there was improvement in behaviour of the victim. Accordingly, the victim was discharged from Hospital on September 10, 1999 after arrangement of Police Guard was made. The police handed-over custody of the victim to her father Babubhai. Dr. Khatri had prescribed follow-up treatment, which was not given by relatives of the victim. After discharge from Hospital, Babubhai did not find any improvement in behaviour of the victim. He, therefore, called his son-in-law Rajesh Gordhan from Jamnagar. Accordingly, Rajesh Gordhan met Babubhai and suggested to him that the victim should be lodged at religious place situated at Satadhar. The suggestion made by Rajesh Gordan was accepted by Babubhai and accordingly, the victim was left at religious place of Satadhar. Thereafter, after 15 or 20 days, the authorities of the religious place, situated at Satadhar, came and lodged the victim at the house of her father i.e. Babubhai. Therefore, again, Babubhai called his son-in-law Rajesh. This time, Rajesh suggested that the

victim should be lodged at Village Virpur, where temple of Lord Jalaram is situated. Accordingly, the victim was left to the care of the temple authorities. The temple authorities did not take any interest in her, as a result of which, though the victim was residing in Village Virpur, she was wandering here and there in the town. On October 2, 1999, the victim went to hut of one Hansrajbhai Jadhav, situated in Virpur Village for begging. It may be stated that Hansrajbhai Jadhav was residing in the hut with his wife Kalavatiben. Hansrajbhai gave some articles of food to the victim to eat and thereafter, the victim went away from the door of hut occupied by Hansrajbhai. On October 2, 1999, it was raining and, therefore, the victim was sitting near the hut of Hansrajbhai Jadhav. At about 8.00 P.M., the original accused No. 6 i.e. Nathabhai Rupabhai Sasla, who was maintaining himself by driving rickshaw came near the hut of Hansrajbhai Jadhav with his rickshaw. At the instance of Hansrajbhai Jadhav, the original accused No. 6 picked up the victim and made her to sit in his rickshaw. One Ms. Narangiben Bachubhai Rathod, residing at Village Virpur, went in the morning of October 3, 1999 to purchase vegetables. She found that the victim was lying near hut of *luhar* and several persons had collected

there. Those, who had collected near the hut of *luhar,* informed Ms. Narangiben that the victim was lying since 7 A.M. and that some arrangements should be made about her. Ms. Narangiben consoled the victim and asked her name as well as the place where she was residing. Thereupon, the victim stated that she was of Village Vagadia and also disclosed her name, stating that she was belonging to Patel community. Ms. Narangiben tried to know as to how she was found in Village Virpur, whereupon the victim informed Ms. Narangiben that she was brought to Village Virpur by her parents and was left in a temple. Ms. Narangiben further asked the victim as to how she was found lying on the road when she was left in a temple by her parents and thereupon, the victim informed Ms. Narangiben that one rickshaw driver had taken her and that she was subjected to rape. Ms. Narangiiben asked her whether she was able to identify the place where rape was committed on her, and after saying “yes”, the victim took Ms. Narangiben to the place where rape was committed on her. The place was *Mataji-No-Mudh* (*sanctum sanctorum*) of Goddess *Mataji*. The victim had put on sari and blouse which were found by Ms. Narangiben to be dirty. From *Mataji-No-Mudh*, Ms. Narangiben brought the victim to her house where the victim informed Ms. Narangiben that there

was no one in the world to take care of her. Ms. Narangiben, thereafter, sent the victim to water-pump to enable the victim to have a bath where the victim took bath and washed her clothes. On the next day, a person named Atul Koli, residing near house of Ms. Narangiben, approached Ms. Narangiben and asked Ms. Narangiben to hand-over the custody of the victim to him. Ms. Narangiben refused to hand-over the custody of the victim to Atul Koli i.e. original accused No. 1 in Sessions Case No. 129 of 1999. Thereupon, Atul Koli attempted to drag the victim by catching hold of her hands, but Ms. Narangiben foiled that attempt by saying that she would not hand-over custody of the victim to him even if she was murdered. Atul Koli, thereupon, threatened Ms. Narangiben and asked her to drive away the victim from her house. Atul Koli also informed Ms. Narangiben that he, in the company of Bharwad Natha Rupa i.e. original accused No. 6, Bharwad Tisubhai i.e. original accused No. 2, Nanubhai Koli i.e. original accused No. 3 and Puna Mohan Koli i.e. original accused No. 4, had committed rape on the victim and that they would see to it that she was not able to reside peacefully in Devpara area if complaint before the Police was filed. In spite of threats administered to her, Ms. Narangiben was

determined to bring the culprits to book. Therefore, undeterred by the threats administered by original accused No. 1, Ms. Narangiben took the victim to Jetpur Taluka Police Station and lodged complaint against Atul Koli and others, who were named by him. On the basis of complaint lodged by Ms. Narangiben, offences punishable under Section 366 and 376(2)(g) IPC were registered against the accused. The investigation into the complaint of Ms. Narangiben was made by PSI Mr. L. B. Chudasama, who was then PSI Jetpur Taluka Police Station. PSI Mr. Chudasama went to the place of incident shown by the victim. He found that it was a room where idol of Goddess was installed and two cots were kept in the room. It was also noticed by him that there was a TV in the room. PSI Mr. Chudasama drew *panchnama* of place of incident in presence of *panch-witnesses* and seized two mattresses which were found to be blood and semen stained. He recorded statement of the victim and seized clothes of the victim under a *panchnama*. The victim was referred to Government Medical Hospital for examination. The Investigation Officer recorded statements of those persons who were supposed to be conversant with the facts of the case. He arrested five accused i.e. Atul @ Mansukh Bhikhabhai Karelia, Tido @ Tisu Nagjibhai Matia,

Nanubhai Balabhai Thakore, Mahesh @ Munno Mohanbhai Gohil and Pramod Eknath Patil on October 5, 1999 and seized clothes put on by them under a *panchnama*. Thereafter, accused Nathabhai Rupabhai Sasla was also traced and arrested under a *panchnama*. The accused were referred to the Medical Officer of Government Medical Hospital, Jetpur, for Medical Examination. During the course of investigation, the rickshaw, in which the victim was picked-up by original accused No. 6 when she was sitting near the hut of Hansrajbhai, was also seized. The samples of pubic hair, saliva, semen, blood, etc. of the appellants and other accused were collected. The incriminating articles seized during the course of investigation were sent to Forensic Science Laboratory for analysis. After obtaining the report from Forensic Science Laboratory (*"FSL"*, for short) and the certificate from the Superintendent, Mental Hospital, Jamnagar, the six accused were chargesheeted in the Court of learned Judicial Magistrate (First Class), Jetpur, for commission of offences punishable under Sections 366 and 376(2)(g) IPC. As offences punishable under Sections 366 and 376(2)(g) IPC are exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Rajkot at Gondal for trial, where it was numbered as

Sessions Case No. 129 of 1999.

3. The learned Additional Sessions Judge, Gondal, to whom the case was made over for trial, framed charge against the six accused at Exh. 1, for commission of offences punishable under Sections 363, 366, 376(2)(g) and 506(2) IPC. The charge was read-over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (i) Medical Officer Dr. Hetalben Jayantilal Nayak, who had medically examined the victim, as PW 1, at Exh. 15; (ii) Dr. Jagdishbhai Popatbhai Viredia, who conducted medical examination of accused, as PW 2, at Exh. 20; (iii) Hansrajbhai Mohanbhai Jadhav, near whose hut the victim was sitting and was picked-up by original accused No. 6, as PW 3, at Exh. 37; (iv) Devidas Hematram Chatrabuj as PW 4, at Exh. 38; (v) Idrishbhai Harunbhai Chhavad as PW 5, at Exh. 39; (vi) *panch* Keshubhai Gandubhai Gohil as PW 6, at Exh. 46; (vii) *panch* Praful Shantilal Joshi as PW 7, at Exh. 47; (viii) *panch* Dilipbhai Nanjibhai Dabhi as PW 8, at Exh. 48; (ix) *panch* Kanubhai Devayatbhai Herma as PW 9, at Exh. 49; (x) *panch* Khimjibhai Govabhai Rathod as PW 10, at Exh. 50; (xi) *panch* Mukeshbhai Devayatbhai Herma as PW 11, at Exh. 51; (xii) Ms. Kalavatiben

Sumangalsinh as PW 12, at Exh. 52; (xiii) Ms. Rekhaben Harishbhai Ganatra as PW 13, at Exh. 53; (xiv) Dr. Arunbhai Jayantilal Khatri as PW 14, at Exh. 57; (xv) Dr. Naginbhai Bhuvanbhai Sarvaiya as PW 15, at Exh. 65; (xvi) Rajabhai Karamsibhai Mir as PW 16, at Exh. 70; (xvii) the victim as PW 17, at Exh. 71; (xviii) complainant Ms. Narangiben Bachubhai Rathod as PW 18, at Exh. 72; (xix) father of the victim i.e. Babubhai Jethabhai Jadhav as PW 19, at Exh. 73; and (xx) Investigating Officer Mr. Lakhuba Bhurubha Chudasama as PW 20, at Exh. 74, to prove its case against the accused. The prosecution also produced documentary evidence, such as: (i) certificate issued by Dr. Hetalben Naik after examining the victim at Exh. 16; (ii) *yadi* forwarded by PSI to Medical Officer, Government Hospital, Jetpur, to examine the five accused named therein, at Exh. 21; (iii) medical papers of accused Mahesh at Exh. 31; (iv) certificate issued by Dr. Viredia after examining accused Mahesh, at Exh.33; (v) Medical papers of accused Pramod, at Exh. 34; (vi) certificate issued by Dr. Viredia after examining accused Pramod, at Exh. 36; (vii) arrest *panchnama* of accused Atul, Tido, Nanubhai, Mahesh and Pramod, etc. and seizure of their clothes, at Exh. 40; (viii) *panchnama* indicating recovery of clothes of accused Pramod, at Exh. 41; (ix)

arrest memo of original accused No. 6, at Exh. 42; (x) *panchnama* indicating recovery of clothes put on by accused Nathabhai Rupabhai at the time of incident, at Exh. 43; (xi) *panchnama* indicating seizure of rickshaw, at Exh. 44; (xii) order passed by the learned Chief Judicial Magistrate directing Hospital for Mental Health, Jamnagar to admit the victim and treat her, at Exh. 58; (xiii) Medical papers of the victim prepared at the Hospital for Mental Health, Jamnagar, at Exh. 60; (xiv) report by Superintendent, Mental Hospital, after examining the victim, at Exh.63; (xv) report issued by Dr. Sarvaiya, after examining the original accused No. 6, at Exh. 68; (xvi) complaint of Ms. Narangiben, at Exh. 75; (xvii) *panchnama* of place of incident, at Exh. 77; (xviii) *panchnama* indicating seizure of clothes of the victim, at Exh. 78; (xix) arrest *panchnama* of five accused i.e. Atul, Tido, Nanu, Mahesh and Pramod, at Exh. 79; (xx) deed of sale of rickshaw by one Sulemanbhai to Devidas, at Exh. 81; (xxi) report of FSL at Exh. 84; etc. in support of its case against the accused.

4.1 After recording of evidence of prosecution witnesses was over, the learned Judge of the Trial Court explained to the accused, the circumstances appearing

against them in the evidence of prosecution witnesses and recorded their further statements, as required by Section 313 of the Code of Criminal Procedure, 1973.

4.2 In his further statement, the original accused No. 1 i.e. Atul Bhikabhai Karelia claimed that he was doing labour work, as instructed by one Chavdabhai, who was serving in Gujarat Electricity Board, and along with him, accused Mahesh @ Munno Mohanbhai and accused Nanubhai were also working. According to him, there were disputes between Mr. Chavda, who was serving in Gujarat Electricity Board, and Ms. Narangiben and, therefore, he was falsely implicated in the case by Ms. Narangiben. The original accused No. 1 further claimed that he was not knowing anything about the incident and was innocent. According to him, a false case was lodged against him, as a result of which, the reputation of the family was besmirched. What was mentioned by original accused No. 1 was that he was innocent and should be acquitted.

4.3 The original accused No. 2 i.e. Tido @ Tisu Nagjibhai Matia, in his further statement, mentioned that he was friend of original accused No. 1 Atul and as he had close relations with original accused No. 1 i.e.

Atul, he was falsely implicated in the case.

4.4 The original accused No. 3 i.e. Nanubhai Balabhai Thakore, in his further statement, mentioned that he was falsely implicated in the case by Ms. Narangiben. According to him, he had come to Village Virpur from Ahmedabad, 5 days before he was arrested and a false case was lodged against him.

4.5 The original accused No. 4 i.e. Mahesh @ Munno Gohil, in his further statement, mentioned that Atul, Nanubhai and he were approaching Mr. Chavda of Gujarat Electricity Board for obtaining work, and as relations between Ms. Narangiben and Mr. Chavda were strained, his name was falsely given by Ms. Narangiben. According to him, he had informed PSI Mr. Chudasama that they were innocent and were not knowing anything and thereupon, PSI Mr. Chudasama had asked him to give names of 7 other persons, who were wealthy. What was mentioned by original accused No. 4 in his further statement was that it was not possible for him to give names of innocent persons falsely, as demanded by PSI Mr. Chudasama and, therefore, he was falsely implicated in the case, but he was innocent.

4.6 The original accused No. 5 i.e. Pramod Eknath Patil, in his further statement, mentioned that he was serving in Jalaram Mandir and his duty hours were 6.00 A.M. to 10.00 P.M. According to him, he was not knowing Ms. Narangiben at all and was staying opposite Railway Station, Virpur. What was asserted by accused No. 5 in his further statement was that he was falsely implicated in the case and was not knowing anything about the incident at all.

4.7 The original accused No. 6 i.e. Nathabhai Rupabhai Sasla, in his further statement, mentioned that before the incident, he was having matador which was detained by the police. According to him, he had purchased matador from PSI Mr. Parmar but could not make full payment of the consideration, as a result of which PSI Mr. Chudasama was visiting him at his house and demanding the due amount. It was further mentioned by accused No. 6 in his statement that he was not able to make full payment of matador belonging to PSI Mr. Parmar and, therefore, the matador was detained by PSI Mr. Chudasama. According to him, he presented himself with reference to instant case on his own at Jetpur Police

Station where he was beaten and asked to give names of owners of guest-house. What is asserted by accused No. 6 in his statement is that he refused to give names of innocent persons and, therefore, he was falsely implicated in the case. It was also mentioned by him that he was staying in the area where Ms. Narangiben was staying and that his prestige was dear to him but he was falsely implicated in this case.

4.8 It is relevant to notice that no defence evidence whatsoever was led by any of the accused to substantiate what was stated and / or claimed in the further statement.

5.1 On critical analysis of the evidence adduced by the prosecution, the learned Judge held that following circumstances were firmly established by the prosecution:

(i) Witness Hansarjbhai had witnessed that on October 2, 1999, original accused No. 6 Nathabhai Rupabhai had taken the victim with him in his rickshaw.

(ii) Between night of October 2, 1999 and October 3,

1999, rape was committed on victim at the place known as *Mataji-No-Mudh*, which was situated behind GEB Sub-station, Virpur, after making her lie on the mattresses, as a result of which, the mattresses were found to be semen stained whereas the petticoat put on by the victim was also found to be semen stained and vaginal swab also indicated presence of semen.

(iii) In the morning of October 3, 1999, the victim was found lying in a helpless condition near the hut of *luhar,* as a result of which complainant Ms. Narangiben Bachubhai Rathod had consoled her, whereupon the victim had informed her that she was taken by a *rickshawala* and, thereafter, raped. The victim had shown the place where rape was committed which turned out to be *Mataji-No-Mudh*. Thereafter, she brought the victim to her house and permitted the victim to stay in her house for two days i.e. October 3, 1999 and October 4, 1999, and as the victim was vomiting, she was taken to dispensary of Dr. Chandubhai for treatment.

(iv) Though it was learnt by complainant Ms. Narangiben that the victim was subjected to rape on October 3, 1999, Ms. Narangiben could not file the complaint because names of perpetrators of crime were not disclosed to her by the victim nor the identification marks, on the basis of which identification of perpetrators of crime could be established, were disclosed to her.

(v) On October 5, 1999, accused No. 1 Atul @ Mansukh Bhikabhai had met Ms. Narangiben on way and threatened her to drive away the victim, saying that he and accused No. 2 Bharwad Tido as well as accused No. 3 Nanubhai Balabhai and accused No. 4 Mahesh @ Munno as well as accused No. 6 Nathabhai Rupabhai had committed rape on the victim, and if complaint was filed, she would not be able to stay in Devpara area, and on such assertion being made by accused No. 1, complainant Ms. Narangiben had learnt that the victim was subjected to rape by abovereferredto persons, and, therefore, on that very day, Ms. Narangiben had lodged complaint against those five persons at Jetpur Taluka Police Station.

(vi) In the complaint, name of accused No. 5 was not given because it was not disclosed by original accused No. 1 to the complainant, but, subsequently, original accused No. 5 was prosecuted, as, his name, as one of the perpetrators of crime, was disclosed by other accused during their interrogation.

(vii) On October 5, 1999, original accused Nos. 1 to 5 were arrested, and they were sent to Jetpur Government Hospital for medical examination on the next day, where all the five accused admitted before Dr. Viredia that they had committed rape and, therefore, extra-judicial confession of those accused was a relevant piece of evidence.

(viii) On the pants of accused Nos. 1, 3, 4, 5 and 6 and on *chorni* put on by original accused No. 2, stains of semen were found.

(ix) From glanswash of original accused Nos. 1 to 5, presence of semen was found.

(x) On the petticoat put on by the victim, semen of the same group as that of original accused Nos. 1, 3, 4 and 5 was found.

(xi) From the place of incident, mattresses were seized under a *panchnama*, which were found stained with semen of the same group as that of original accused Nos. 1, 3 and 6. The vaginal smear and urethral slide of the victim indicated that semen, group of identity which could not be ascertained, was found.

5.2 The learned Judge, on review of evidence, held that the circumstances established by the prosecution were conclusive in nature and chain of circumstances was fully established. According to the learned Judge, the circumstances established by the prosecution were consistent only with the guilt of original accused Nos. 1, 2, 3, 4 and 6 and not consistent with innocence of any of them, but those circumstances were not sufficient to prove the charge levelled against the original accused No. 5.

5.3 In view of abovereferredto conclusions, the learned Judge has convicted original accused Nos. 1, 2, 3, 4 and 6 for commission of offences punishable under Sections 366 and 376(2)(g) IPC and imposed sentences referred to earlier, whereas the learned Judge has acquitted original accused No. 5 *vide* judgment dated June 22, 2001, giving rise to abovenumbered two appeals. It may be stated that the original accused Nos. 2 and 6 have not challenged their conviction by filing any appeal under Section 374(2) of the Code of Criminal Procedure, 1973, nor the State has challenged acquittal of original accused No. 5 by filing an acquittal appeal under Section 378 of the Code of Criminal Procedure, 1973.

6. Mr. B. S. Supehia, learned Counsel of the appellants, contended that the victim was a mentally retarded girl from birth and was neither able to understand nor express herself, as a result of which, the claim, advanced by complainant Ms. Narangiben that she was informed by the victim that the victim was raped, should not have been believed by the Trial Court. According to the learned Counsel, the testimony of complainant Ms. Narangiben shows that on October 3, 1999, she had taken the victim before Dr. Chandubhai as the

victim was vomiting, but Dr. Chandubhai is not examined by the prosecution and, therefore, after drawing adverse inference against the prosecution, the case made out by complainant Ms. Narangiben should have been disbelieved. It was asserted by the learned Counsel that there is delay in filing FIR, which is not explained at all and, therefore, the whole case of the prosecution becomes suspicious. Elaborating this argument, it was argued that the incident in question is alleged to have taken place between the night of October 2, 1999 and October 3, 1999 whereas complaint was filed only on October 5, 1999 at 13.30 Hours by Ms. Narangiben, and as the delay is not explained by the prosecution, the prosecution case should be disbelieved, more particularly, when the evidence of Ms. Narangiben shows that she had quarrelled with accused No. 1 and was, therefore, out to implicate the accused falsely in the case. The learned Counsel pleaded that, according to the prosecution, the incident in question had taken place in *Mataji-No-Mudh*, where, normally, a priest would be found or a *chowkidar* to protect the Mudh would be found, but neither the priest of *Mataji-No-Mudh* is examined nor *chowkidar,* discharging duties at the Mudh, is examined, and, therefore, after drawing adverse inference against the prosecution, the case of the

prosecution should be disbelieved. What was maintained by the learned Counsel of the appellants before the Court was that medical evidence of Dr. Hetalben is only an opinion evidence, and as medical evidence does not indicate that the victim was subjected to rape, the abovenumbered appeals should be accepted. According to the learned Counsel of the appellants, the pant put on by the appellant No. 2, which was seized during the course of investigation, did not indicate that it was stained with semen of original accused No. 2 nor the examination of mattresses revealed that the mattresses were stained with semen of accused No. 2 and, therefore, his appeal deserves to be allowed. According to the learned Counsel of the appellants, it was not probable that the accused No. 1 would inform the complainant i.e. Ms. Narangiben that he, in the company of others, had committed rape on the victim and, therefore, on the basis of statement made by Ms. Narangiben, the appellants should not have been convicted. It was stressed that there was no occasion for original accused Nos. 1 to 5 to make extra-judicial confession before the doctor, who had treated them, by stating that they had committed rape, and the evidence of extra-judicial confession being weak in nature should not have been relied upon by the learned Judge of the Trial

Court. What was claimed before the Court was that most of the male persons have either 'A' Group or 'B' Group or 'O' Group of semen and, therefore, find of these groups of semen on mattresses and / or apparel put on by the victim could not have been used to fasten criminal liability on the appellants. The learned Counsel asserted that the learned Judge of the Trial Court has failed to appreciate the evidence on record in its true perspective and, therefore, both the appeals should be allowed. In support of these submissions, the learned Counsel of the appellant relied upon the decisions of the Supreme Court in: (i) **Rahim Beg Vs. The State of Uttar Pradesh, AIR 1973 SC 343**; and (ii) **Subhash Chand Vs. State of Rajasthan, JT 2001(8) SC 505**.

7. Mr. K. T. Dave, learned Additional Public Prosecutor for the State, contended that, as the victim, who was mentally retarded girl, was subjected to barbaric rape by the appellants and others after taking undue advantage of her helpless condition, the learned Judge of the Trial Court, who had advantage of observing demeanour of the witnesses, was justified in convicting the appellants and others for commission of offence punishable under Section 376(2)(g) IPC. It was argued

that but for the helping hand extended by Ms. Narangiben, the incident in question would not have seen the light of the day, and as the defence has failed to impeach credibility of complainant Ms. Narangiben, the conviction of the appellants under Section 376(2)(g) IPC should not be regarded as erroneous. The learned Counsel of the State Government asserted that the evidence of the complainant does not indicate that there was any enmity between complainant Ms. Narangiben on one hand and accused No. 1 or for that matter, other accused on the other, and, therefore, the claim, advanced by Ms. Narangiben that she was threatened with dire consequences by accused No. 1 and that the accused No. 1 had proudly pronounced before her that he, in the company of others, had committed rape on the victim, should be accepted by the Court. The learned Counsel for the State pointed out that Dr. Viredia had no reason to concoct any evidence against any of the appellants or other accused and, therefore, his assertion, that while examining the accused, he had recorded history as narrated by the accused wherein the accused had confessed that they had committed rape, deserves acceptance. It was pleaded that the history, by accused before Dr. Viredia when they were presented before him for Medical Examination and recorded

by Dr. Viredia, shows that they had committed rape on the victim four days prior to their examination by Dr. Viredia and, therefore, the extra-judicial confession made by the accused should be taken into consideration by the Court while determining guilt or otherwise of the appellants. It was argued that the find of same group of semen on the pants put on by the appellants and others as well as on mattresses, which were seized from place of incident, and the petticoat, put on by the victim, makes it very clear that the appellants and others were the persons who had subjected the victim to rape, and this circumstance completes chain of circumstances against the appellants. According to the learned Additional Public Prosecutor, the defence taken up by each of the accused in his further statement could not be even remotely probabilised, and taking of false defence should also be treated as a circumstance against them. It was argued that absence of find of semen either on the pant of the appellant No. 2 or absence of find of semen having the same group as that of original accused No. 2 on apparel put on by the victim would not exonerate him, because, before recording conviction 376(2)(g) IPC, it is not necessary for prosecution to establish that each of the accused had committed rape on the victim. In support of

this submission, the learned Additional Public Prosecutor placed reliance on the decision of the Supreme Court in **Bhupinder Sharma Vs. State of Himachal Pradesh, (2003) 8 SCC 551.** The learned Additional Public Prosecutor asserted that cogent and convincing reasons have been recorded by the learned Judge of the Trial Court for convicting the appellants and others for commission of offences punishable under Sections 366 and 376(2)(g)IPC, and as the learned Counsel of the appellants has failed to dislodge those weighty reasons, the appeals, which have no merits, should be dismissed.

8. This Court has heard Mr. B. S. Supehia, learned Counsel of the appellants and Mr. K. T. Dave, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. This is a case based on circumstantial evidence. The prosecution has not claimed that rape on the victim was witnessed by anyone. The record shows that an

attempt was made by the prosecution to prove its case by examining the prosecutrix, but her evidence could not be recorded by the learned Judge of the Trial Court, as the learned Judge was of the opinion that the victim was not in a position to give rational answers to the questions put to her. Thus, even the evidence of prosecutrix is of no help to the prosecution. As the Court is dealing with the case based on circumstantial evidence, it would be advantageous to refer to principles, which should be borne in mind while deciding a case based on circumstantial evidence.

10.1 The law relating to circumstantial evidence is well settled. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances can not fail. Therefore, many a times it is aptly said that "men may tell lies, but circumstances do not". In cases where evidence is of a

circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established, should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis except the one sought to be proved. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, Court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is, or are not decisive. Where a case rests squarely on circumstantial evidence, the various sets of circumstantial evidence should be taken into consideration and their total effect should be

such that they must lead unerringly to the guilt of the accused. Each fact must be proved individually and only thereafter the sum total of the proved facts has to be taken into consideration, but this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must prove each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. In **Sharad v. State of Maharashtra, A.I.R. 1984 SC 1622**, after referring to earlier case law, the Supreme Court has summarized the conditions to be fulfilled in a case based on circumstantial evidence as under: (i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may' be established, (ii) the fact so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (iii) the circumstances should be of conclusive nature and tendency; (iv) they should exclude every possible hypothesis except the one to be proved; (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in

all human probability the act must have been done by the accused; and (vi) where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court.

10.2 If the aforesaid various conditions are fulfilled, only then a Court can use a false explanation or a false defence as an additional link and not otherwise. As observed earlier, if the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of

the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case.

11. Having noticed relevant principles governing a case based on circumstantial evidence, this Court proposes to consider the question whether the circumstances sought to be relied upon by the prosecution are firmly established and whether the guilt of the appellants is satisfactorily proved.

(i) The first circumstance, which is sought to be proved by the prosecution, is that the victim, who was a mentally retarded girl from birth, was left in lurch by her father Babubhai Jethabhai at Virpur and that, she was wandering here and there in Village Virpur. To prove this circumstance, the prosecution has examined witness Babubhai Jethabhai as PW 9, at Exh. 73. The witness has mentioned, in his testimony before the Court, that earlier, his marriage had taken place with Ms. Dudhiben, who had given birth to the victim and that the victim was

mentally retarded girl. According to him, marriage of the victim was arranged with one Rajesh Gordhan of Jamnagar, who was handicapped and doing sundry work. The witness has mentioned that the victim had stayed with her husband Rajesh for about one and a half year and as Rajesh was not able to take care of the victim, Rajesh had left the victim at his house. The witness has further informed the Court that at his instance, the victim was admitted to Hospital for Mental Health, Jamnagar, but in spite of treatment, noticeable improvement in the victim was not found. According to this witness, he had, therefore, called his son-in-law i.e. Rajesh and on his advice, he had left the victim to the care of authorities of Satadhar Temple, but after 15 or 20 days, authorities of Satadhar Temple had come with the victim and left her at his house. It is further mentioned by the witness that thereafter, again he had called his son-in-law Rajesh and at his instance, the victim was left in Village Virpur, where temple of Lord Jalaram is situated. Though this witness has been cross-examined gruelly, nothing could be brought on record to shake his assertion that he had left his daughter at Village Virpur. On re-appreciation of evidence of witness Babubhai, this Court comes to the conclusion that

it is firmly established by the prosecution that the victim was left by her parents at Virpur and that she was wandering here and there and also begging.

(ii) The second circumstance, which is sought to be proved by the prosecution, is that on October 2, 1999 at about 8.00 P.M., the original accused No. 6 had picked-up the victim in his rickshaw when she was sitting near the hut of Hansrajbhai Jadhav. In order to prove this fact, the prosecution has examined Hansrajbhai Mohanbhai Jadhav as PW 3 at Exh. 37. This witness, in his testimony, has stated that he is residing in Village Virpur, and since 10 years, serving with Virpur Gram Panchayat. According to him, his first marriage had taken place with Ms. Samjuben, who was daughter of Bhagabhai of Village Chordi and that Ms. Samjuben had given birth to two sons during the subsistence of her marriage with him. What is mentioned by this victim is that thereafter, Ms. Samjuben had started living as wife of his younger brother, and, therefore, he was staying all alone in Village Virpur. It is mentioned by witness that prior to six months of the incident, he had remarried with Ms. Kalavatiben, who was staying in huts situated near bus-stand of Village Virpur. According to him, on October 2,

1999, he had noticed that a woman, who was looking mad, had come near his hut for begging and at that time, he was standing inside his hut. The witness has asserted that he had given some articles of food to the said woman to eat after which the woman had left the door of the hut and was sitting near his hut. The witness has mentioned before the Court that on October 2, 1999, it was raining, and at that time, the original accused No. 6 i.e. Natha Bharwad had come with his rickshaw and after making that woman sit in his rickshaw, had driven away. This witness was searchingly cross-examined by the defence, but his assertion, that the original accused No. 6 had come and taken away the victim with him in his rickshaw, could not be demonstrated to be untrue. The suggestion, made by the defence to this witness that he had not seen that the victim was taken by accused No. 6 in his rickshaw, is emphatically denied by him.

It may be mentioned that to prove this case, the prosecution had also examined Ms. Kalavatiben Sumangalsinh, who is wife of witness Hansrajbhai Jadhav. However, she did not support the prosecution case, as a result of which, she was declared hostile to prosecution and confronted with her police statement. What is

relevant to notice from the testimony of witness Hansrajbhai Jadhav is that, according to him, his wife Kalavatiben was ill and had not come out of the hut at all when the victim had come to beg. It means that witness Kalavatiben had no occasion to notice as to what had happened outside her hut. The assertion, made by witness Hansrajbhai that his wife was ill and, therefore, she had not come out of hut when the victim had come to beg, is not challenged by the defence in his cross-examination at all. Therefore, the fact that Ms. Kalavatiben, who is wife of witness Hansrajbhai, had turned hostile and did not support prosecution is of little assistance to the defence. On re-evaluation of the evidence of witness Hansrajbhai Jadhav, this Court is of the firm opinion that the second circumstance, that on October 2, 1999, the victim, who was mentally retarded and was sitting near the hut of witness Hansrajbhai, was picked-up by accused No. 6 at about 8.00 P.M. in his rickshaw when it was raining, is firmly established. It is relevant to notice that the original accused No. 6 drives rickshaw and maintains himself. The victim, who was mentally retarded and in tatters, was not able to pay fare to original accused No. 6. The victim had no fixed place of residence in Village Virpur nor the original

accused No. 6 was relative of the victim. Under the circumstances, it was for the accused No. 6 to inform the Court as to where he had taken the victim on October 2, 1999 and what happened to her thereafter. However, no explanation worth the name could be given by original accused No. 6 as to where he had taken the victim on October 2, 1999 and what had happened to the victim thereafter.

(iii) The third circumstance, which is heavily relied upon by the prosecution, is that gang rape was committed on the victim in *Mataji-No-Mudh*, which is situated in Village Virpur. To find out whether this circumstance is proved, it would be relevant to notice the testimony of Ms. Narangiben as well as that of Investigating Officer and the contents of *panchnama* of place of incident. Ms. Narangiben, who is complainant in this case, is examined by the prosecution as PW 18 at Exh. 72. Ms. Narangiben, in her testimony, has stated that on October 3, 1999, she had found the victim lying near the hut of *luhar* and that a small group had collected. According to her, she had consoled the victim and tried to know from her as to how she was found near the hut of *luhar*. It is asserted by Ms. Narangiben that thereupon, she was informed by the

victim that her parents had left her in the temple situated at Village Virpur. Ms. Narangiben has further stated that thereupon, she had asked the victim as to how she was found near the hut when she was left in the temple by her parents and thereupon, she was informed that one *rickshawala* had taken her, after which rape was committed on her. Ms. Narangiben has further mentioned before the Court that she had asked the victim as to whether she was able to point out the place where rape was committed on her and that, thereupon, the victim had shown *Mataji-No-Mudh* as the place where rape was committed on her. Ms. Narangiben has mentioned that she had found that the clothes put on by the victim were dirty and had, therefore, brought the victim to her house and sent to a hand-pump to enable the victim to have a bath. Ms. Narangiben has stated that the victim had taken bath and washed her clothes.

Her evidence further shows that on the next day, original accused No. 1 Atul Koli had met her and asked her to hand-over custody of victim to him but she had refused to hand-over custody of the victim to Atul, as a result of which, Atul had started dragging the victim by hand and the attempt made by Atul to drag the victim was

foiled by her and at that time, several persons had collected. What is mentioned by Ms. Narangiben is that Atul i.e. accused No. 1 had, thereupon, threatened her and asked her to drive away the mad woman from her house and informed her that he, Bharwad Natha Rupa, Bharwad Tisubhai, Nanubhai Koli and Punaji Koli had committed rape on her and warned her that she would not be permitted to stay in Devpara area if any attempt was made to file a complaint. This witness asserted before the Court that undeterred by the threats administered by original accused No. 1, she had filed complaint before the police. This witness is gruelly cross-examined by the defence. According to her, original accused No. 1 had not married but had permitted the woman, who had left her house, to stay with him. It was then stated by Ms. Narangiben, in her cross-examination, that the original accused No. 1 was not doing anything whereas the other accused were doing labour work. In her cross-examination also, it was maintained by Ms. Narangiben that an attempt was made by original accused No. 1 i.e. Atul to drag the victim by catching her hand. During her cross-examination, Ms. Narangiben informed the Court that the original accused No. 2 Tido @ Tisu Nagji was married and was father of three sons and one daughter. However, a

strange suggestion was made to Ms. Narangiben that she had no quarrel whatsoever either with accused No. 1 or accused No.2 or with their family members and this suggestion is accepted by the witness. It means that Ms. Narangiben had no enmity whatsoever either with accused No. 1 or for that matter with accused No. 2 or with any of the relatives of those accused. The suggestion, made by the defence that a story was constructed by her to implicate the accused, is emphatically denied by her. The suggestion, made by the defence that the victim, who was mad, had narrated one story, but she had understood another thing and lodged compliant, is also emphatically denied by her. Several other irrelevant suggestions were made to her, which were denied by her. Thus, the testimony of Ms. Narangiben clearly establishes that the victim had taken her to *Mataji-No-Mudh* and pointed that place as place where rape was committed on her. Though the witness was subjected to lengthy cross-examination, nothing could be brought on record to impeach her credibility and, therefore, her evidence deserves acceptance.

(iv) The next circumstance, which is sought to be proved by the prosecution, is that on October 5, 1999,

the original accused No. 1 had met complainant Ms. Narangiben on road, and threatened her to drive away the mad girl from her house, saying that he and accused No. 2 Bhardwad Tido as well as accused No. 3 Nanubhai Balabhai and accused No. 4 Mahesh @ Munno as well as accused No. 6 Natha Rupa had taken the mad girl with them and committed rape on her, and Ms. Narangiben would not be permitted to stay in Devpara area, if compliant was filed, as a result of which the complainant learnt that the victim was subjected to rape by abovenamed accused and had, therefore, filed complaint on October 5, 1999 at 1.30 PM against the accused. It is relevant to notice that this fact is firmly and assertively stated by the complainant Ms. Narangiben in her examination-in-chief.

It is relevant to notice that the accused and Ms. Narangiben are residing in the same area. Therefore, it was but natural for the accused to notice that Ms. Narangiben had brought the victim in her house. Naturally, therefore, the accused were alerted and apprehended that a complaint would be filed against them by Ms. Narangiben, who had brought with her the victim in her house. Therefore, the claim, advanced by Ms. Narangiben before the Court that she was threatened by

accused No. 1 and asked to drive away the victim from her house as well as not to file complaint, inspires confidence of this Court, as it has inspired confidence of the learned Judge of the Trial Court, who had advantage of observing the demeanour of the witnesses.

The record shows that most of the accused were doing nothing and were wandering. There are people in the society who take pride in telling others that they had committed rape on a girl. Therefore, the claim, advanced by complainant Ms. Narangiben that the original accused No. 1, while threatening her, had informed her that he and other accused had committed rape on the victim also, deserves to be accepted.

It is relevant to notice that it was suggested to the complainant that she had no quarrel whatsoever either with the original accused No. 1 or the original accused No. 2 and that was accepted by the complainant. It means that the complainant had no enmity against either the original accused No. 1 or for that matter against any of the accused. Thus, false implication by the complainant stands completely ruled out.

12. The contention, of the learned Counsel of the appellants, that she had not filed complaint even though she knew about rape having been committed on the victim on October 3, 2005, but chose to file compliant only after threats were allegedly administered to her on October 5, 2005 by accused No. 1, which would indicate that accused were falsely implicated, cannot be accepted. In fact, the defence has failed to bring on record any fact which would suggest that complainant Ms. Narangiben was on inimical terms with any of the accused. Being a lady, she had extended her helping hand to the victim, who was found lying near the hut of *luhar* in a helpless condition, and she had brought the victim to her home. As the accused were staying near the house where the complainant was staying, they had apprehension that compliant would be lodged against them and, therefore, the original accused No. 1 had threatened her. The threat, administered by accused No. 1, cannot be regarded as enmity on the part of original complainant Ms. Narangiben, which would prompt her to lodge false case against any of the accused. It is relevant to notice that Virpur is a big village where several people reside and, therefore, there was no reason for complainant Ms. Narangiben to state either in her complaint or before the

Court that the accused No. 1 had also named other accused who had committed rape on the helpless victim. There is in-built assurance in the claim advanced by the complainant and, therefore, the same will have to be accepted.

13. Similarly, the plea, that there is delay in lodging complaint and therefore, prosecution case should be disbelieved, is merely stated to be rejected. It is relevant to notice that, after seeing a crowd having gathered near the hut of *luhar* and victim lying there, the original complainant had offered solace to the victim and taken her into confidence. The testimony of Ms. Narangiben would show that she had asked her as to how she was found lying near the hut of *luhar* and thereupon, according to her, she was informed by the victim that she was left in a temple by her parents. Her testimony would show that thereupon, she had asked the victim as to how she was found near the hut when she was left in the temple by her parents and thereupon, the victim had informed her that a person had taken her in a rickshaw and that she was subjected to rape. The testimony of the complainant further shows that thereupon, she had tried to know from the victim as to whether she was knowing the

place where rape was committed on her and according to her evidence, the victim had said “yes” and shown *Mataji-No-Mudh* as the place where rape was committed on her. However, from her testimony, it is very clear that the victim was mentally retarded and was not able to give names of the person who had committed rape on her. It was only on October 5, 1999 in the morning that she had learnt from assertion made by the accused No. 1 that he in the company of other accused had committed rape on the victim and, therefore, without loss of time, she had lodged the complaint at Jetpur Taluka Police Station against the accused. Thus, there is no delay whatsoever in lodging the complaint and delay, if any, stands satisfactorily explained by the complainant.

14. Even if one were to seek corroboration to the testimony of complainant Ms. Narangiben, the same is available in abundance on the record of the case. The testimony of Investigating Officer Mr. L. B. Chudasama, recorded at Exh. 74, would indicate that after lodging of complaint, he had visited the place of incident, as shown by the victim, which was *Mataji-No-Mudh* and prepared *panchnama* of place of incident. According to him, in the room, two mattresses, kept on an iron cot, were found and

it was noticed that they were stained with blood and semen and, therefore, seized. It may be mentioned that the pants put on by the appellant Nos. 1,2,3,4 and 6 were also found stained with semen and, therefore, seized. The petticoat put on by the victim was also found to have been stained with semen having the same group as that of original accused Nos. 1, 3, 4, 5 and 6. Thus, it is satisfactorily proved by the prosecution that between the night of October 2, 1999 and October 3, 1999, the victim was subjected to gang rape in *Mataji-No-Mudh* situated at Village Virpur and that too by the appellants and others.

Further, original accused Nos. 1 to 5 were arrested on October 5, 1999 and referred to Dr. Jagdishbhai Popatbhai Viredia for medical examination. Dr. Viredia is examined by the prosecution as PW 2 at Exh. 20. Dr. Viredia has assertively stated in his testimony before the Court, that before examining the accused, he had tried to collect history and that each accused had stated that he had committed rape. It is relevant to notice that it could not be suggested by the defence that Dr. Viredia was on inimical terms with any of the accused or that he was interested in the mentally retarded girl. Therefore, Dr. Viredia had no reason to

state falsely before the Court that extra-judicial confession was made by the accused examined by him. Dr. Viredia stands completely corroborated by contemporary medical records prepared by him, which is produced by the prosecution at Exh. 22, Exh. 23, Exh. 26, Exh. 27, Exh. 28, Exh. 30, Exh. 31, Exh. 33, Exh. 34 and Exh. 36. It is relevant to notice that though it was stated by each accused that he had committed rape on the victim, but name of the victim is not mentioned in the history at all. This is in-built assurance for acting upon the testimony of Dr. Viredia, who has asserted that history, as narrated by each accused, was noted by him on medial papers. Thus, claim advanced by Ms. Narangiben gets support from the testimony of Dr. Viredia also.

15. Further, the report of the Serologist produced by the prosecution at Exh. 84 shows that the mattresses seized from the place of incident as well as sari and petticoat put on by the victim and respective pants put on by original accused Nos. 1 and 6 as well as samples of vaginal smear, semen of the accused, etc. were sent to FSL for analysis and analysed. It further mentions that the mattresses were found to have been stained with semen having 'A', 'B' and 'O' Groups, whereas on the petticoat

put on by the victim, six blots of semen were found, out of which group of semen found on two blots could not be ascertained. It further mentions that two blots were stained with semen having 'B' Group whereas other two blots were found having 'O' Group of semen. As per the report, the group of semen found on the pant of original accused No. 1 was 'A' whereas the group of semen found on *chorni* of accused No. 2 could not be ascertained and the group of semen found on pant of original accused No. 3 was 'O' whereas the group of semen found on the pant of original accused No. 4 was 'B' and the group of semen found on the pant of original accused No. 6 was 'A'. The report further mentions that from the glanswash of original accused Nos. 1 to 6, presence of semen was found but the group could not be ascertained. It is also mentioned in the report that there was semen in Urethral slide, but it was not possible to ascertain its group and that vaginal smear of the victim also indicated presence of semen, but it was not possible to ascertain its group. None of the appellants and / or accused could offer any explanation as to how their group of semen was found on clothes of the victim, and this incriminating circumstance leads credence to the testimony of the complainant. Thus, the involvement of the accused

including appellants in commission of gang rape on the victim, as narrated by complainant Ms. Narangiben, stands corroborated by other reliable evidence on record. It is well to remember that the report of Serologist would be admissible under Section 293 of the Code of Criminal Procedure, 1973 and it was never challenged at all by any of the accused.

16. The plea, that on the basis of statement made by original accused No. 1, others could not have been convicted for commission of offence punishable under Section 376(2)(g) IPC, is devoid of merits. This aspect has been considered by the Supreme Court in **Ram Prakash Vs. The State of Punjab, AIR 1959 SC 1**. After examining the scope of Section 30 of Evidence Act, 1872, the Supreme Court, in paragraph-6 of the reported decision, has *inter alia* held as under:

> *"It will be clear from the terms of this Section that where more persons than one are tried jointly for the same offence, a confession made by any of them affecting himself or any one of his co-accused can be taken into consideration by the court not only against the maker of the confession but also against the co-accused. The Evidence Act nowhere provides that if the confession is retracted, it cannot be taken into consideration against the accused or the confessing accused. Accordingly, the provisions of Evidence*

Act do not prevent the Court from taking into consideration a retracted confession against the confessing accused and his co-accused. Not a single decision of any of the courts in India was placed before us to show that a retracted confession was not admissible in evidence or that it was irrelevant as against a co-accused."

Viewed in the light of the principles laid down by the Supreme Court, which is referred to above, the plea, that on the basis of confession made by original accused No. 1 Atul before complainant Ms. Narangiben, the other accused including the appellants could not have been convicted, cannot be accepted and is hereby rejected.

17 The plea, that the group of semen of the original accused No. 2 was not found on the petticoat put on by the victim and, therefore, he should be acquitted, has no substance. The admission made by the accused No. 2 before the doctor that he had committed rape cannot be ignored by the Court. Further, it is not the requirement of law that in cases of gang rape, evidence of complete act of rape by each accused on the victim should be adduced by the prosecution. This aspect has been considered by the Supreme Court in **Bhupinder Vs. State of Himachal Pradesh** *(supra),* wherein, after relying on the

decision rendered in **Pramod Mahto Vs. State of Bihar, 1989 Supp. (2) SCC 672**, the Supreme Court has held as under:

> *"In cases of gang rape the proof of complete act of rape by each accused on the victim is not required. The statutory intention in introducing Explanation 1 in relation to Section 376(2)(g) appears to have been done with a view to effectively deal with the crime menace of gang rape. In such circumstances, it is not necessary that the prosecution should adduce clinching proof of complete act of rape by each one of the accused on the victim or on each one of the victims where there are more than one in order to find the accused guilty of gang rape and convict them under Section 376 IPC."*

In view of abovereferredto principle laid down by the Supreme Court, the original accused No. 2, who is appellant No. 1 in Criminal Appeal No. 2287 of 2005, cannot be given any benefit at all.

18. The cumulative effect of circumstances proved above clearly establishes that in all human probability, the act of commission of gang rape on the victim was done by the appellants and other convicted accused and by none else. The conclusion drawn by this Court from the proved facts are consistent only with the guilt of the appellants and others and not consistent in any manner

with their innocence.

19. This Court further notices that the Supreme Court in the cases of: (i) **Vasa Chandrashekar Vs. Ponna Sathyanarayana And Another, (2000) 6 SCC 286**; and (ii) **Geetha Vs. State of Karnataka, (2000) 10 SCC 72**, while explaining law on circumstantial evidence, has ruled, that when circumstances proved are put to the accused through his examination under Section 313 of the Code of Criminal Procedure and the accused merely denies some, then such denial would be an additional link in the chain of circumstances to bring home the charge against the accused. As indicated earlier, it is proved by the cogent and reliable evidence that the appellants and others had committed rape on helpless victim. The incriminating circumstances were put to each accused while recording statement under Section 313 of the Code. In the further statement, the case of each accused was that of denial. Therefore, denial on the part of the appellants and others will have to be treated as an additional link in the chain of circumstances to bring home the charge against the accused.

20. Further, it is relevant to note that in his

further statement, the original accused No. 1 Atul Bhikabhai Karelia had claimed that he was doing labour work, as instructed by one Chavdabhai, who was serving in Gujarat Electricity Board, and along with him, accused Mahesh @ Munno Mohanbhai and accused Nanubhai were also working, and as there were disputes between Mr. Chavda and Ms. Narangiben, he was falsely implicated in the case. The same stand was taken by original accused Nos. 2 and 3 whereas original accused No. 4 Mahesh had stated that he was called upon by PSI Mr. Chudasama to give names of 7 wealthy persons as accused, and as he had refused to oblige PSI Mr. Chudasama, he was falsely implicated in the case. This defence was also taken up by original accused No. 6. However, it is relevant to notice that it was not even suggested to PSI Mr. Chudasama that he had either asked original accused No. 4 or original accused No. 6 to give names of innocent persons as accused and he had booked original accused Nos. 4 and 6, as they had refused to oblige him. A fair reading of evidence on record makes it clear that a false defence was taken up by each accused and that also will have to be treated as additional link in the chain of circumstances established against them.

21. The net result of above discussion is that there is no merits in any of the two appeals and, therefore, the same will have to be dismissed.

22. The record shows that the victim was being neglected by one and all, including her parents and husband. In fact, she was wandering here and there in Village Virpur and was maintaining herself by begging. On review of evidence on record, this Court is of the opinion that the Medical Committee was not justified in discharging the victim from hospital at all. If she had not been discharged, her parents and husband would not have taken her to Village Virpur and left her there. In fact, this Court wanted to enhance fine imposed on the appellants and others so that a part of the amount recovered from fine could be used for the benefit of the helpless victim. Therefore, this Court had requested the learned Additional Public Prosecutor to find out whereabouts of the girl. The learned Additional Public Prosecutor has informed the Court that, as per the report dated January 27, 2006 forwarded by the Police Sub-Inspector, Jetpur Taluka Police Station to him, the unfortunate victim expired in the year 2003. Therefore, the exercise which was proposed to be undertaken by the

Court is dropped.

23. For the foregoing reasons, both the appeals fail and are dismissed. *Muddamal* be disposed of in terms of directions given by the learned Judge of the Trial Court in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

/shamnath